IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

MONDAY, THE 10TH DECEMBER 2007 / 19TH AGRAHAYANA 1929

AR.No. 9 of 2007()

APPLICANT

SMT.VIDYA REDDY, HAVING RESIDENCE
AT 705, VARSHA APARTMENTS, ELAMKULAM,
COCHIN - 682 020.

BY ADV. SRI.SATISH MURTI
SMT.UMA MURTHI

RESPONDENTS: OPPOSITE PARTIES

VERTEX SECURITIES LTD, THOTTATHIL
TOWERS, IIND FLOOR MARKET ROAD, ERNAKULAM,
COCHIN- 682 014, REPRESENTED BY ITS
MANAGING DIRECTOR, SRI.RANJAN VARGHESE.

BY ADV. SRI.K.GOPALAN

THIS ARBITRATION REQUEST HAVING BEEN FINALLY HEARD ON 10/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

PIUS C. KURIAKOSE, J.

A.R.NO. 9 of 2007

Dated this the 10th day of December , 2007

O R D E R

Since there is stiff contest to this arbitration request under Section 11(4) read with Section 11(6) of the Arbitration and Conciliation Act, 1996, it is necessary to refer to the facts briefly.

2. The respondent-M/s.Vertex Securities Ltd. is a share broker having membership in the National Stock Exchange Ltd. registered with the Securities and Exchange Board of India (SEBI). On coming to know that the respondent represents various clients in the capital market and is dealing in securities, the applicant appointed the respondent as agent and broker for dealing in securities. Annexure-A1 agreement on printed form was got signed by the applicant and the applicant was allotted trading account No.R-36 for the capital market and FR-36 for F and O transactions. The applicant submits that the respondent which was under a legal obligation to comply with all applicable SEBI norms, mandates, guidelines and directives in the larger interests of investors and clients for reducing market risks and possible losses sought collateral security of Rs.8 to 9 lakhs worth very valuable shares and stocks for enabling the applicant to trade

securities in the capital market and deal in F and O segmented transactions in the NSE. The applicant alleges that on innumerable occasions, the respondent wilfully and overtly neglected to comply with applicable NSE/SEBI/NSCCL-SPAN Regulations for assessment of position vis-à-vis norms for maintaining margins and other statutory requirements vis-à-vis market positions held by the applicant. It is alleged that the applicant's trading account was intentionally manipulated and falsified on 11th and 12 December, 2006 with the intention of covering its own personal losses and by showing a lower than actual margin on the applicant's F and O segment of the NSE. It is then alleged that the respondent acted in bad faith and completely cheated the applicant by unilaterally liquidating the applicant's security shares at an inappropriate time before the close of trade on 12th December, 2006. This was done without any warning or notice and the action of the respondent was arbitrary and dishonest under the pretext of a market crash. Actually, the market definitely showed signs of recovery during the 13th of December, 2006 and later completely recovered and levelled up to a position which would put the applicant in a safe position. The petitioner submits that the "pay-in" reckoned on an M to M basis and in consonance with the NSE mandate settlement schedules for the F and O segment mandates that the

applicant should have been given due and reasonable notice and time for assessing her actual losses and if necessary to restore margins by actually paying for M to M for which the applicant may have become liable on a trading day. It was disregarding the spirit of the arbitration clause contained in Annexure-A1 that the respondent appropriated the applicant's securities. The applicant relies on Annexure-A2 bank statement to show that the applicant had promptly remitted an amount of Rs.3 lakhs on 11.12.2006 itself. It is fraudulently suggesting that the actual remittance is only on 12.12.2006 that the respondent has appropriated the security shares. Annexure-A3 is the complaint preferred against the respondent by the applicant before the Commissioner of Police. The complaint has been registered as Crime No.123 of 2007. The applicant refers to clause 32 of Annexure-A1 and claims that any dispute arising between the client and the broker with regard to and in relation to the transactions will have to be referred to arbitration. Annexure-A4 notice dated 27.1.2007 was issued invoking the arbitration clause. Annexure-A5 is the acknowledgment. There has been no favourable response to the applicant's request for appointment of an independent and impartial arbitrator and hence the arbitration request praying that an independent and impartial arbitrator be appointed for settling the disputes and differences

between the applicant and the respondent with regard to liquidation of valuable security and falsification of accounts.

3. On behalf of the respondent, a detailed counter affidavit has been submitted. Annexure-RI is copy of the Board Resolution authorising the deponent, the Senior Executive of the respondent-Company to represent the Company. It is conceded therein that the respondent is a member of the NSE and carries on business of buying and selling of equity shares and other securities of companies for and on behalf of various clients, both in the capital market and Futures and Options segments of the said Exchange. It is also conceded that the applicant was a client of the respondent-Company and had executed with it general agreement dated 27.3.2006 copy of which is produced as Annexure-R2 (filled up version of Annexure-A1). It is also conceded that in terms of Annexure-R2, the applicant entered into transactions of buying and selling of shares of companies in the capital market segment and had dealings in securities in the F and O segment of the NSE through the respondent. It is pointed out that the alleged dispute is as regards transactions executed on 'futures' segment of NSE. The counter affidavit alleges that the applicant defaulted in effecting daily payments on the due dates in respect of the transactions carried out on her behalf and consequently in terms of clause 12 of Annexure-R2

agreement, the respondent sold the shares lodged by her as collateral security and set off the amounts realised against outstanding dues payable by the applicant. The allegations regarding manipulation of accounts and non-compliance of statutory rules, mis-appropriation of funds, acting in bad faith are all stoutly denied.

4. It is further submitted in the counter affidavit that even after the part payments effected by the applicant, as reflected in Annexure A2 bank statement, the steep fall in share prices on 12.12.2006 resulted in a huge amount becoming due from her and the respondent was left with no other option than to invoke clause 12 of Annexure R2 agreement and sell the shares lodged as collateral security in order to fulfill the commitment to the exchange on time, failing which, the respondent was liable to pay the amounts due caused by the default of the applicant in discharging her obligation stipulated under clause 13 of Annexure R2 to make payment before the closure of business hours on the day of trade execution. Denying allegations of misrepresentation of facts regarding the payment remitted by the applicant and absence of non issuance of notice to her regarding sale of her security shares, it is pointed out that clause 12 of Annexure R2 does not stipulate the issuance of any such notice to the client, but on the contrary, reserves the member's right to effect the sale without

reference to or confirmation from the client. As regards Annexure A3 police complaint lodged by the applicant, it is contended that the same is a fabricated and not the genuine copy of the complaint originally filed by the applicant. It is claimed that Annexure R3 dated 19.1.2007 obtained from the Chief Judicial Magistrate's Court, Ernakulam, is the certified copy of the complaint. It is alleged that Annexure R3 has been fraudulently produced deleting several vital paragraphs of the original complaint with the objective of suppressing material facts and misleading this court. Denying paragraphs 11 to 14 and grounds (A) to (D), it is contended that the request for an independent arbitrator to settle the alleged disputes and differences between the parties is not sustainable since Annexure R2 agreement provides for appointment of an arbitrator by the Stock Exchange concerned. Clause 1.1.3 of Annexure 1 to R2 agreement is highlighted and it is submitted that disputes will be subject to arbitration as per the Rules, Bye-Laws and Regulations of the Stock Exchange. Referring to Clause 32 of Annexure R2 agreement, it is contended that in case of any dispute relating to transactions executed on any segment of any Stock Exchange, the applicant was bound to file her grievance application only at the Investor Grievance Cell/Arbitration Department of the concerned Stock Exchange. Annexure R4 is a copy of the reply

submitted by the respondent and it is pointed out that the above aspect of the matter had been disclosed in Annexure R4. Annexure R5 post office communication is relied on to contend that Annexure R4 reply was received by the applicant. It is contended that the applicant has already filed her grievance application with the Investor Grievance Cell of the National Stock Exchange and Annexure R6 communication dated 7.6.2007 received from the National Stock Exchange by the respondent is relied on. Also relied on in this context is Annexure R7, a further communication received from the National Stock Exchange by the respondent. It is contended that the respondent has replied to Annexures R6 and R7 and the grievance application submitted by the applicant is under consideration of the National Stock Exchange for reference to arbitration as per its Bye-laws/Regulations. The disputes relate to transactions executed on the 'Futures" segment of the Exchange and the grievance application has already been filed in terms of arbitration clause 32 of Annexure R2 General Agreement. The applicant is bound by the arbitral agreement to take recourse to and to avail the arbitration facility provided under the bye-laws/regulations of the Exchange. NSE has got an effective and efficient arbitration machinery with its own panel of competent and independent arbitrators well conversant with the capital market

operations who are to be chosen by the parties to the disputes and appointed by the relevant authority of the Exchange in accordance with the procedure laid down by Regulation No. 5 of its capital Market trading Regulations. Hence the application under Section 11 of the Arbitration and Conciliation Act 1996 is misconceived and unsustainable. Counter affidavit goes on to quote the relevant Bye laws of the National Stock Exchange of India concerning the arbitration and it is highlighted that the provision of the Bye laws and Regulations of the Stock Exchange shall be deemed to form part of all dealings,contracts and transactions.

5. The applicant has placed additional documents Exts.P6 and P7 on record. It is submitted that Ext.P6 is a true copy of the undated correspondence with an Investor complaint Form issued by the National Stock Exchange to the applicant. It was in response to Ext.P6, that the applicant received Annexure R6 communication dated 7.5.2007 from the respondent. The applicant was later served again with the same form vide letter dated 7th June 2007 and in response to that letter the applicant issued Ext.P7 reply dated 16.6.2007.

6. Smt.Uma Moorthi, the learned counsel for the petitioner and Sri.K.Gopalan, the learned counsel for the respondent have addressed me at length on the basis of the pleadings raised by their respective

parties and the various documents place don record. Smt.Moorthi would place strong reliance on the judgment of the Supreme Court in **SBP & Co. v. Patel Engineering Ltd. and another (2005) 8 Supreme Court Cases 618)** and argue that no prejudice will be caused to the respondent by the appointment of an independent and impartial arbitrator by the highest judicial authority in the State which itself is a guarantee for the quality of the arbitration proceedings and the prospective award. This court can always appoint a learned retired Judge of this court or any other High Court who will be competent to deal with any question relating to the practices and procedures relating to Stock Exchange transactions.

7. It is not in dispute that disputes have arisen between the applicant and the respondent in relation to the transactions in the future segment of the Stock Exchange as envisaged and are liable to be dissolved by arbitration in view of clause 32 of Annexure A1 agreement.

Clause 32 of Annexure A1 reads as follows;

"**32.Arbitration:**

> Any and all disputes arising out or in connection with this agreement or performance shall be settled by arbitration by a single Arbitrator to be appointed by Vertex Securities Limited. The arbitration shall be held in Cochin, in accordance with the provisions of Arbitration and Conciliation

> Act 1996, as amended from time to time. In case of any dispute relating to transaction executed on any segment of any Stock Exchange, the CLIENT agrees to file the grievance application only at the Investor Grievance Cell/Arbitration Department of the concerned Stock Exchange situated at Mumbai, Maharashtra and other Regional Centres."

Annexure R2 produced by the respondent is the full text of the general agreement between the parties. In Annexure R2 clause 3.3. states that the right and obligation of the CLIENT(applicant) are incorporated in Annexure 1. It is clause 1.1.3 of Annexure -1 which is highlighted by the respondent and that clause reads as follows:

> "1.1.3 any dispute with the MEMBER with respect to deposits, margin money, etc. and producing an appropriate proof thereof, shall be subject to arbitration as per the Rules, Bye-laws & Regulations of NSE/BSE or its Clearing Corporation/clearing House."

Clause 1.3.11 of Annexure-1 provides that in the case of complaint against a MEMBER/Registered Sub- Broker, the client shall address the complaint to the office as may be specified by NSE/BSE from time to time. The essential contention of the respondent is that the applicant is bound to file grievance application, with the Investor Grievance Cell/arbitration Department of the concerned Stock Exchange and having already filed such grievance application is not

entitled to invoke the appointment procedure envisaged by the Arbitration and Conciliation Act 1996.

8. Having carefully examined the nature of the many faceted disputes between the parties which are seen to fall even outside the contours of the relevant clauses of Annexure I, I am not inclined to accept the above contentions of the respondent straightway. The above contentions also can be gone into by the Arbitrator to be appointed. In other words, arbitrability of the disputes by an independent arbitrator itself can be an issue before the arbitrator. Both sides submits that the stakes involved is very high. In my opinion no prejudice will be caused to either of them by appointing a retired judge known for learning and integrity.

9. The Arbitration Request will stand allowed. Smt.K.K.Usha, retired Chief Justice of this court is appointed as an arbitrator for settling the various disputes which are subject matter of this arbitration case. It is open to the respondent to file preliminary objections before the arbitrator regarding the arbitrability of the disputes in the light of the clauses in Annexure R2 agreement and its Annexures and also the apparent pendency of the proceedings before the NSE. The arbitrator will give her award on the preliminary objections first and subject to that only will continue with

the arbitration proceedings and pass award settling all the disputes considering the clauses as well as the counter claims.

PIUS C. KURIAKOSE,
JUDGE.

tgl/dpk